Supreme Court, U.S.
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In The

# Supreme Court of the United States

RAR DEVELOPMENT ASSOCIATES,

*Petitioner,*

vs.

NEW JERSEY SCHOOLS CONSTRUCTION CORPORATION and NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,

*Respondents.*

**On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Here the New Jersey Schools Construction Corp. and the New Jersey Economic Development Authority (herein jointly referred to as the "State"), without instituting a condemnation proceeding, directed RAR Development Associates' ("Petitioner") largest Tenant to leave Petitioner's Property and paid that Tenant in excess of Five Million Dollars in "relocation benefits" to ensure that the Tenant would leave the Property. The State thereafter decided it would not pursue a condemnation of Petitioner's Property. Petitioner submits that these acts of the State, exercising dominion over the Property and the leasehold relationship usurped rights of the owner and constitute a taking under the New Jersey and Federal Constitutions. The Courts below held that no "taking" occurred.

DOES THE ACTION OF THE STATE IN PAYING A TENANT TO VACATE A PROPERTY WITHOUT INSTITUTING A CONDEMNATION PROCEEDING CONSTITUTE A TAKING?

## PARTIES TO THE PROCEEDING

The following persons and entities are the parties to these proceedings in the Courts below: RAR Development Associates; New Jersey Economic Development Authority; New Jersey Schools Construction Corp.; and New York Folding Box Co.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, respectfully prays that a Writ of Certiorari be issued to review the decision of the Appellate Division of the State of New Jersey affirming the decision of the New Jersey Superior Court granting Summary Judgment to the State and the decision of the Supreme Court of New Jersey declining to review such decision.

The Fifth and Fourteenth Amendments to the United States Constitution and Article I of the New Jersey Constitution require that property owners be paid just compensation for governmental takings. The actions taken by the State clearly resulted in a taking of property. The decision of the Appellate Division, denying compensation to Petitioner was a clear violation of the Fifth and Fourteenth Amendments prohibition against taking of property without just compensation. Since the Supreme Court of the State of New Jersey denied Petitioner's request for certification to review the Appellate Division's decision review by this Court is both permissible and required to prevent an abuse of governmental power in the exercise of their lawful rights of eminent domain.

## OPINIONS BELOW

The decision of the Supreme Court of the State of New Jersey denying Petitioner's request for review of the New Jersey Appellate Division decision; the Appellate Division's unreported decision affirming

the Superior Court's dismissal of the Complaint filed by Petitioner and the decision of the New Jersey Superior Court granting the State's motion to dismiss Petitioner's Complaint.

## JURISDICTION

The judgment of the Supreme Court of New Jersey denying a Motion for Reconsideration of the Petition for Certification was entered on April 2, 2009. The jurisdiction of this Court rests upon 28 U.S.C. §1257. Petitioner expressly raised the federal questions presented in this Petition by invoking its rights under the United States Constitution. Count Four of the Petitioner's Complaint specifically alleged an unconstitutional taking without just compensation (App. Div. at 7) and the issue was argued before the trial court and at all levels of appeal. The Appellate Division of the State of New Jersey analyzed Petitioner's claim under the Fifth Amendment to the United States Constitution as well as the State Constitution. (App. Div. at 15-37). This case raises for the first time important questions as to what is deemed to be "property" which cannot be "taken" without compensation. It also raises the question as to whether or not as a condition precedent to a condemning authority's right to pay an occupant of a building relocation and moving expenses, the condemning authority must, actually acquire the property the Tenant vacates.

## CONSTITUTIONAL PROVISIONS INVOLVED

The State's actions violated the Fifth Amendment to the United States Constitution, which provides that "private property [shall not] be taken for public use, without just compensation."

This amendment is applicable to the State's actions by virtue of the Fourteenth Amendment.

In its Complaint, Petitioner alleged that the actions taken by the State constituted a taking of its property without payment of just compensation and therefore, constituted a violation of Petitioner's Fifth and Fourteenth Amendment rights which prohibit taking of property without payment of compensation. The Superior Court found that the State's actions did not constitute a "taking" of Petitioner's Property. The Appellate Division affirmed the Lower Court's decision that there was not a taking of Petitioner's Property under the Fifth and Fourteenth Amendments.

## STATEMENT OF THE CASE

### I. PRELIMINARY STATEMENT

The Supreme Court of the State of New Jersey has refused to hear an appeal from a decision of the New Jersey Appellate Division affirming a decision of the New Jersey Superior Court granting Summary Judgment to the New Jersey Schools Construction

Corporation (the "NJSCC") and the New Jersey Economic Development Authority (the "NJEDA"), the NJSCC and NJEDA being jointly referred to herein as (the "State") which was made on the following undisputed facts.

1. The State identified Petitioner's Property as the site for the construction of a new public high school.

2. The State determined that in order to meet its construction schedule, demolition of a 725,000 square foot building on Petitioner's Property ("Petitioner's Property") would have to commence on or before January 1, 2005.

3. The State determined that a Tenant occupying approximately 25 percent of Petitioner's Property would need in excess of one year to move its operations to another location. Therefore, in order to meet a scheduled January 1, 2005 date to begin demolition of Petitioner's Property, the State agreed in writing to reimburse the Tenant for approximately Five Million Dollars in moving and relocation expenses. The Tenant demanded the written guarantee because its bank would not lend it the moving costs without the State's guarantee of reimbursement and it could not move without bank financing.

4. Based on the State's guarantee of reimbursement, the Tenant received the bank financing it needed, the Tenant found a new location and began the relocation process.

5. At the time of making the guarantee, the State had not commenced condemnation proceedings or entered into an agreement to purchase Petitioner's Property.

6. After the Tenant acquired a new location and was irrevocably committed to relocating and had begun the moving out process, the State determined that the cost of constructing a school on Petitioner's Property was prohibitive and it, therefore, abandoned its interest in acquiring Petitioner's Property. The State, however, agreed to pay the Tenant approximately Five Million Dollars if and when the Tenant moved out of Petitioner's Property. The Tenant moved out of Petitioner's Property and the State paid the Tenant approximately Five Million Dollars to reimburse the Tenant for its moving and relocation expenses.

7. Petitioner filed a Complaint in the New Jersey Superior Court which alleged that the State's actions as outlined above resulted in the termination of its lease with the Tenant which but for those actions would have continued until December 31, 2009. The Complaint further alleged that those actions:

(a) violated the State's obligations under the laws applying to condemnation and relocation (Count One);

(b) constituted tortious interference with Petitioner's leases with its Tenants and, in particular, its lease with the Tenant

it paid the relocation expenses to Petitioner (Count Two);

(c) constituted tortious interference with prospective economic advantage (Count Three);

(d) amounted to a taking of Petitioner's Property without payment of just compensation (Court Four);

(e) represented a conversion of Petitioner's Property (Count Five); and

(f) constituted a violation of Petitioner's rights under color of law in violation of 42 U.S.C. §1983 (Count Six).

8. The Superior Court granted the State's Motion for Summary Judgment and dismissed Petitioner's Complaint. The Appellate Court affirmed the Superior Court's decision and the Supreme Court denied Petitioner's request for certification.

Government does not have the right to take any action, which it, in its sole discretion deems appropriate in the exercise of its eminent domain powers. On the contrary, its actions and powers are restrained and restricted by the constitutionally protected rights granted to property owners under the Fifth and Fourteenth Amendments to the Federal Constitution and the New Jersey Constitution.

In reaching their decisions, both the Superior Court and the Appellate Division were required to find that Petitioner's Tenant only relocated because of

the State's actions and would have continued to occupy Petitioner's Property under a lease whose term would expire on December 31, 2009 and pay rent to Petitioner pursuant to the terms of the Lease until December 31, 2009, but for the State's actions. The State has acknowledged and the record is clear that the State actions with respect to Petitioner's Tenant were taken for the sole purpose of meeting its self-imposed demolition and construction timetable. Certainly, the State could have delayed a commitment to the Tenant until it was irrevocably committed to acquiring Petitioner's Property. To do so, however, would have delayed its demolition and construction schedule. The State concluded that it would rather risk Five Million Dollars of taxpayer's funds than delay its construction schedule. It is manifestly unfair, unjust and violative of Petitioner's constitutionally protected rights for the State to be able to reach that conclusion, and take the actions it took without incurring any liability for the damages such actions caused to Petitioner.

The important public policy and Federal Constitutional issues at stake in this matter and the need for this Court's review are summed up in the State's Brief in Opposition to the Petition for Certification Petitioner filed with the Supreme Court of the State of New Jersey ("Respondent's Brief"). In the State's Brief, it asserts that it would be "ineffectual and illogical" for a condemner to wait until it either executed a purchase agreement for property needed for a public project or file a condemnation action

before committing to relocation benefits to an occupant because waiting would result in costly construction delays. The State's position in this case is that if it pays relocation expenses to cause an occupant to move, but subsequently decides not to acquire the property, it has no liability to the property owner for the loss of its Tenant and the resulting rental income it would have received from the Tenant under its lease agreement with the Tenant. This unbridled assertion of the State's awesome powers is well beyond the parameters of the Fifth and Fourteenth Amendments of the Federal Constitution and the New Jersey Constitution and requires this Court's review.

## II. ACTIONS OF THE COURTS BELOW

Petitioner filed a complaint against the State alleging that these actions amounted to tortious interference with contract, tortious interference with the Petitioner's prospective economic advantage with its Tenant, and a "taking" without just compensation under the State and Federal constitutions. *Id.*

The State filed a motion for Summary Judgment dismissing Petitioner's Complaint and Petitioners cross moved for summary judgment on the taking issue. *Id.*

The Trial Court granted the State's motion and denied Petitioner's cross motions and the Appellate Division affirmed the Trial Court decision, holding in

part that there was no compensable taking under the Fifth Amendment.

## III. STATEMENT OF MATTER INVOLVED

This case was determined on a Summary Judgment motion filed by the State prior to the conduct of discovery. The material facts are not in dispute.

Petitioner has been the owner of land and buildings located in Newark, New Jersey known as Block 2487 Lot 1.01, Newark, New Jersey (the "Property"), consisting of connected buildings approximating 725,000 square feet on 13.5 acres of land since 1979. Petitioner does not occupy the Property and derives all of its income from rents paid by Tenants occupying the Property.

Petitioner's Tenant, New York Folding Box Company (NYF) held the largest leasehold interest consisting of approximately 109,000 square feet of space. NYF's occupancy of the Property began in 1976. Petitioner and NYF regularly and consistently entered into new leases and or lease amendments extending the term of NYF's occupancy of its Property. *Id.*

On December 30, 1999 Petitioner and NYF entered into an Amendment to Lease extending the term to December 31, 2004. The Amendment gave NYF an option to renew the lease for an additional five (5) year period ending December 31, 2009. The renewal right was exercisable on notice to the Petitioner given on or before May 15, 2004. *Id.*

In March, 2002, the NJEDA identified the Property as a potential site for construction of the proposed Newark East Side High School. *Id.* at 4. The State inspected the property and visited the Tenants occupying the Property in October, 2002 to discuss the possible condemnation and to assess each Tenant's relocation needs and costs. *Id.*

The State, on July 24, 2003, sent certified letters to each of the Tenants occupying the Property, advising that it *would* be acquiring the Property by January 1, 2005 and intended to commence demolition of the building located on the Property 25% of which was occupied by NYF on that date. The State also advised the Tenants that they might be entitled to benefits and reimbursement of moving expenses. The State advised all Tenants that they would ***only*** be entitled to these benefits if they were occupying the Petitioner's Property when the State acquired ownership.

After receipt of that letter and subsequent discussions between the Tenants and State representatives, all of the Tenants, including NYF began searching for new locations.

Based on its investigation of the Property and the Tenants occupying it, the State concluded that it would take at least one year for NYF to dismantle and move its vast and large machinery and equipment to a new location and that same could be achieved only at substantial cost. (App. Div. at 4-5).

In a letter dated October 5, 2003, the State again confirmed to NYF that it would have to be relocated to a new facility and stated:

> NJSCC has made the offer to purchase the property, **if negotiations prove fruitless, the case will proceed to final condemnation if necessary, with NJSCC ultimately owning the property in the very near future**. Upon ownership, a short-term lease for a minimal amount will be executed between NJSCC and your company, for the period of time you require to complete The relocation.

(App. Div. at 5) (emphasis supplied).

On November 14, 2003, the State advised NYF and the other Tenants that a Complaint and Declaration of Taking, with an Order permitting deposit of funds, and this acquisition matter will be filed soon by our assigned counsel . . . (and) we expect to have legal possession of the property prior to the end of 2004.

At the direction of the State, NYF began seeking a new location. NYF advised the State it had found a new location for its business and that it required financing to effect the relocation and, that in order to secure the financing, its lender required NYF to produce a written guarantee from the State confirming it would pay NYF's relocation costs of $5,039,100.62. (App. Div. at 5).

To ensure NYF's relocation, on November 6, 2003, the NJSCC sent a letter to NYF advising that NYF was authorized to spend an amount not to exceed $5,039,100.62, in order to be reimbursed for the expense incurred in relocating its personalty contained in the premises it was leasing from Petitioner to a new location. (App. Div. at 5). In that letter, the State unequivocally agreed to reimburse NYF for its relocation expenses whether or not it acquired the Property.

Based upon the State's representations in its letter of November 6, 2003 NYF's lender approved the loan to fund NYF's relocation and NYF began dismantling its machinery and started the process of vacating the Property and relocating to its new facility. (App. Div. at 6).

In issuing the November 6, 2003 letter guaranteeing relocation benefits to NYF, the State effectively ensured that NYF would irrevocably commit to relocating its business which directly caused the termination of the lease between NYF and Petitioner which the Appellate Division found as a matter of fact they would have continued until December 31, 2009, but for the State's actions.

At the time it was acting to cause NYF to relocate, the State (a) was aware that Petitioner had declined its offer to purchase the Property, (b) had affirmatively asserted that it was unequivocally taking the Property regardless of whether it was able to negotiate a purchase from Petitioner, (c) had already

advised NYF that it was going to proceed by filing a Declaration of Taking.

On April 20, 2004, the State sent correspondence to NYF advising that it was abandoning its condemnation of the Property. The State agreed to honor its obligation to pay NYF's relocation costs, since relocation activities were already well underway. (App. Div. at 6).

Legally committed to take occupancy of its new facility in November of 2003 and having commenced the movement of its property to this new facility, NYF terminated its lease with Petitioner, vacated the premises it was leasing from Petitioner and completed its relocation. (App. Div. at 6-7). The State paid NYF over Five Million Dollars for NYF's relocation costs, (App. Div. at 7), but denied any obligation to Petitioner.

For purposes of granting the State's motion for Summary Judgment, the Superior Court and Appellate Division were required to find as a matter of fact that NYF and Petitioner were legally bound to a lease for a term ending on December 31, 2009.

NYF affirmed in the Crossclaim it filed against NJSCC in this matter that but for the actions of the State, it would have renewed its lease and continued to occupy Petitioner's Property until December 31, 2009 pursuant to the Lease. The Appellate Division in reaching its decision, accepted as a fact that NYF would have renewed its lease with Petitioner but for the State's affirmative actions. These factual findings

are further supported by the record which makes it clear that NYF could not secure financing for the Five Million Dollar cost of relocating without the State guarantee to reimburse it for such costs. Additionally, without the State reimbursement, NYF would have to save Five Million Dollars in its occupancy costs to justify relocating. The Five Million Dollar cost of relocation exceeded the total rents NYF would have to pay Petitioner during the entire term of the renewal period. In short, it is clear that the cost of relocating made it impossible for NYF to relocate unless a third party, the State, paid those costs and that absent the State's payment, NYF would still be paying rent to Landlord under its Lease.

## REASONS FOR GRANTING THE PETITION

### I. THE STATE'S ACTIONS WHICH ENSURED THE PROPERTY WOULD BE VACANT AND AVAILABLE TO IT AS AND WHEN IT DESIRED WAS AN EXERCISE OF OWNERSHIP AND CONDUCT WHICH CONSTITUTED A TAKING

The Appellate Division accepted as fact, Petitioner's allegations as set forth in its Amended Complaint that NYF would have renewed its lease with Petitioner and therefore, Petitioners would have had a lease with NYF expiring on December 31, 2009, but for the State's actions.

There is no question that the State's actions were intended to and in fact caused Petitioner's Tenant NYF to relocate its business and end its lease relationship with Petitioner. The State admits the primary factual predicates of Petitioner's case, stating:

> . . . NYFBC, a tenant with extraordinary relocation needs, was given **an early commitment of relocation costs** by the NJSCC. At the time of its commitment, the NJSCC was still negotiating with RAR as to the purchase price . . . without NJSCC's commitment [to pay relocation benefits to Plaintiff's tenant], NYFBC would [have] been unable to secure financing needed to purchase a new facility and vacate the building by December 31, 2004 [the NJSCC had targeted January 1, 2005 as the date for demolition of the building]. Indeed, if the NJSCC had not done so, its acquisition and construction schedules would have been adversely affected (emphasis supplied).

The Superior Court, in finding no taking had occurred, concluded:

> THE COURT: Well, this is a troublesome case under the particular fact pattern presented, but the first thing that I'll start with is the question of whether or not there was a taking, and as I do read the case law, the – to be a taking there has to be a substantial diminution of the value to virtually render the property valueless, which I don't think was the case here.

> In New York Folding space was I guess approximately a quarter of the building, may not have been that. But it certainly, their leaving didn't destroy the building itself, and I don't think really destroyed the value of that space. *It did have value as property* that *could be leased, if not to New York Folding, to somebody else.*

In affirming the Superior Court's decision that there was no compensable taking, the Appellate Division stated:

> The gravamen of plaintiff's inverse condemnation argument is that the State's actions deprived plaintiff of its property rights under its lease with NYF and should be deemed a taking of that leasehold interest, as a result of which plaintiff should be compensated for its loss of expected income under the lease (subject to plaintiff's obligation to mitigate damages by making its best efforts to re-rent the space). The State initially argues that plaintiff held no compensable property interest in NYF's option to renew its lease and to future rental income it would provide. Alternatively, the State argues that even if the option to renew were deemed a compensable property interest, the State's actions did not constitute a taking. We agree with the Sate on both points, which we will discuss in that order.

As articulated by the Appellate Division, Petitioner does not contend that the State's actions resulted in a physical taking of Petitioner's real estate.

Rather, Petitioner contends that the State's actions were a taking of its contractual and property rights under its lease with NYF and resulted in a taking of its leasehold interests thereunder.

A Landlord's interest in a lease is a property right. A "lease" is defined as "[a] contract for exclusive possession of lands, tenements or hereditaments for life, for term of years, at will, or for any interest less than that of lessor, usually for a specific rent or compensation." *Black's Law Dictionary* at 615 (6th Ed. 1991). A "Lessor's Interest" is defined as "[t]he present value of the future income under the lease, plus the present value of the property after the lease expires (reversion)." *Id.* at 626. A lease creates a legal estate for both the landlord-lessor and the Tenant-lessee. *See Klein v. Journal Square Bank Bldg. Co.*, 110 N.J.Eq. 607, 613 (Ch. 1932) (termination of a lease affects Lessor's property right). Here, Petitioner's actions resulted in the taking of the present value of RAR's interest under a lease with NYF that, but for the State's actions, would have continued until December 31, 2009.

It is well settled law that a contract such as a lease and a leasehold interest created thereunder constitute "property" under the Fifth Amendment which cannot be taken without just compensation. *United States v. Petty Motor Co.*, 327 U.S. 372, 380-81 (1946). It is further settled law that actions taken by a governmental entity which render property valueless constitute a taking under the Fifth Amendment. There can be no question that the State's actions resulted in

the termination and expiration of Petitioner's lease with NYF, rendered Petitioner's lease with NYF valueless and extinguished its leasehold interest and all of its right to receive rents thereunder through December 31, 2009.

Contracts such as lease agreements are a protected property interest which cannot be taken without payment of just compensation. A contract being an intangible, cannot be physically taken. A taking of contract occurs when a government agency takes actions which destroy and render valueless a person's contractual rights under a contract.

In the present case, it is an undisputed fact that absent the pre-emptive actions taken by the State, Petitioner and NYF would have had a lease agreement under the terms of which NYF rented approximately 25% of Petitioner's Property until December 31, 2009 and paid the rent and additional rent provided for in the lease agreement to Petitioner until December 31, 2009. In taking these pre-emptive actions, the State assumed prerogatives of ownership and control over Petitioner's leasehold interest, the lease and Petitioner's contractual rights thereunder which were tantamount to a physical taking. The actions of the State caused the termination of the lease agreement with NYF with the result that Petitioner's right to receive the rent and additional rent NYF was required to pay thereunder was taken. This constituted a taking of property without payment of compensation and, therefore, violated Petitioner's Fifth Amendment rights.

## II. THE ACTIONS OF THE STATE IN PROVIDING RELOCATION ASSISTANCE TO NYF WERE NOT JUSTIFIED UNDER N.J.S. 20:4-4(a) AND THE ENABLING REGULATIONS PROMULGATED THEREUNDER (THE "RELOCATION ACT")

The Appellate Division stated:

> We conclude that the frustration of this lease agreement caused by the State's justified efforts to provide relocation assistance to NYF, did not affect a compensable taking. (App. Div. at 12).

The Relocation Act only permits payment of relocation benefits where the condemning authority has "actually" acquired the property and the Tenant is occupying the property at the time of the acquisition. The Declaration of Policy section of the Act states that its purpose "is to establish a uniform policy for the fair and equitable treatment of persons displaced by the acquisition of real property by the State . . . " N.J.S. 20:4-2. The term "displaced person" under the Act is defined as a person who actually relocates from real property "as a result of the acquisition of such real property, in whole or in part, or the result of the written order of the acquiring agency to vacate real property." N.J.S. 20:4-3c.

Nothing in the Relocation Act authorized the State, in the absence of an actual taking, to promise or actually pay relocation benefits. The promise to pay and actual payment made by the State in this

case either constituted an acknowledgement that a taking had occurred (thus bringing the State's actions within the Relocation Act), or an improper act not authorized by law which tortiously interfered with Petitioner's relationship with its Tenant, NYF and directly caused the termination of its lease with NYF and the loss of Petitioner's right to receive rents from NYF under the lease until December 31, 2009.

An interpretation of the Relocation Act that permits the payment of relocation assistance before an irrevocable decision is made to acquire the property a person is being displaced from defies logic and common sense. Paying relocation benefits to a Tenant before an irrevocable decision is made to acquire the property guarantees wasteful use of government funds and permits an unregulated intrusion by government into private contracts, contractual relationships and economic relationships.

The public has a right to expect our executive branch to only take actions which are authorized by statutes and in the exercise of those statutory granted rights to use common sense and not to take actions, which are unreasonable and capricious. This is particularly true when the actions are taken in connection with a State's restricted and circumscribed rights of Eminent Domain.

In reaching its decision the Appellate Division made a factual determination that the State "dutifully followed" the Relocation Act and that its actions were justified due to the "unique circumstances" of

this case, which required a "special accommodation." These factual determinations were made before Petitioner had an opportunity to conduct discovery or present any evidence to rebut the factual findings. Implicit in this finding is a finding that the State could only pay relocation benefits if such payment was authorized under the Relocation Act. Since the payment of relocation benefits was not permitted under the Relocation Act, no circumstances can justify such payment.

The unique circumstances of this case are that the State concluded that it would take NYF one year to relocate its business and that if NYF did not commence the relocation process in November of 2003, the State's demolition and construction schedule would be delayed which would cause an increase in its costs of constructing and completing the high school. The special accommodation was made solely to accommodate the State's goals and objectives. NYF did not need a special accommodation. No matter when it commenced the relocation process, it would take approximately one year to complete.

For reasons set forth above, the unique circumstances and need for special accommodation were merely a self-created condition arising from the State's unilateral determination of a construction schedule it desired to meet. Nothing about that construction schedule compelled the State's action or justified its acting outside its authority under the Relocation Act. Had the Appellate Division found that the State's actions were not justified, it would and

should have found that those actions did effect a compensable taking.

Assuming that the State's claims of a need for "special accommodation" could ever justify acting outside the authority granted under the Relocation Act, that determination clearly could not be made on a summary judgment motion prior to any discovery and an evidentiary hearing. The State justified its actions based on a desire to meet its self-imposed construction schedule. The State did not explain and Petitioner had no ability to explore why the State's prospective construction schedule could not be altered. The Trial Court and Appellate Division decisions to dismiss Petitioner's case predicated on a finding of justified State action therefore precluded Petitioner from having a fair hearing to determine if a compensable taking occurred.

N.J.A.C. 5:11-4.2, relied upon by the Appellate Division in concluding that the State had a right to pay relocation benefits, states:

> Whenever a displacing agency determines that their activities shall cause a displacement of individuals or businesses that are eligible for relocation payments and assistance, the displacing agency shall notify those individuals and businesses, in writing, *at the earliest possible date* of the benefits and obligations of the Act and this chapter. Said notice *shall be issued immediately upon the determination of the displacing agency*

*that displacement shall occur* . . . (emphasis supplied).

This regulation only directs the displacing agency to provide notice. It does not authorize the payment of relocation benefits, which can only be done if the State acquires the property a person is being displaced from.

The State recognized that N.J.A.C. 5:11-4.2 was only a requirement to give notice at the earliest time in its letter of July 24, 2003. The State on July 24, 2003, sent certified letters to each of the Tenants occupying the Property, advising that it *would* be acquiring the Property by January 1, 2005 and intended to commence demolition of the building located on the Property 25% of which was occupied by NYF on that date. The State also advised the Tenants that they might be entitled to benefits and reimbursement of moving expenses. The State advised all Tenants that they would ***only*** be entitled to these benefits if they were occupying the Petitioner's Property when the State acquired ownership.

## III. ACTIONS WHICH CAUSE A TENANT NOT TO RENEW A LEASE CONSTITUTE A COMPENSABLE TAKING

The principle that a threatened condemnation, which causes a Tenant to not renew its lease and vacate the demised premises, may constitute a taking is illustrated in the case *Reichs Ford Road Joint Venture v. State Roads Commission of Maryland*, 388

Md. 500, 880 A.2d 307 (2005). There, the plaintiff owned property which it leased for use as a gas station. The Maryland State Highway Administration ("SHA") advised plaintiff that it intended to condemn the property with regard to a project involving construction of a new highway interchange. 388 Md. at 505, 808 A.2d at 309. The SHA also met with plaintiff's lessee and advised of the intended condemnation and its entitlement to relocation assistance. *Id.* In 1997, when the initial lease term expired, the lessee elected not to exercise its option to extend the lease term, apparently due to the "looming specter of condemnation." *Id.* The lessee subsequently vacated the property in 1998, and plaintiff contended it was unable to lease the property due to the threatened condemnation. Subsequently, in 2001, the SHA instituted condemnation proceedings to acquire the subject property. In addition to this legal proceeding, plaintiff filed a separate inverse condemnation complaint seeking reimbursement of, *inter alia*, lost rental income and carrying costs for the property. There, as here, the trial court summarily dismissed plaintiff's case concluding that plaintiff had no claim for the loss of its Tenant. Upon a motion *in limine* by the SHA, the trial court concluded that loss of rental income was not an appropriate measure of damages and dismissed the inverse condemnation action. 388 Md. at 507-08, 880 A.2d at 310-11.

On appeal, the Court of Appeals of Maryland reversed. The court held that plaintiff was entitled to seek compensation in inverse condemnation for lost

rental income and the cost of maintaining the property. In reaching this holding, the court noted that inverse condemnation was "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Reichs Ford, supra,* 388 Md. at 511, 880 A.2d at 313 (citing) *U.S. v. Clarke,* 445 U.S. 253, 257 (1980). The *Reichs Ford* court also concluded that the lower court's conclusion that the lost rental is inadmissible in any condemnation context "is not universally true." *Id.* (citing *Bergman v. State Roads Comm'n*, 218 Md. 137, 140, 146 A.2d 48, 50 (1958) (noting that capitalizing rent is an approved method of valuation of property), and *Brinsfield v. City of Baltimore*, 236 Md. 66, 71, 202 A.2d 335, 337 (1964) (finding that capitalized rents are admissible when determining fair market value of a property to be condemned)). Finally, the *Reichs Ford* court concluded that, although *Kimball Laundry Co. v. U.S.*, 338 U.S. 1 (1949), involved a direct condemnation, "its language is equally applicable to situations, such as that here, where the temporary taking occurs in an alleged inverse condemnation context." 388 Md. at 513, 880 A.2d at 314.

There is no question that the State's actions caused NYF not to renew its lease. The State's appraisal of Petitioner's Property utilized the capitalization of rents to determine the value of Petitioner's Property. Therefore, under the principles enunciated in *Reichs Ford* and *Kimball*, a compensable taking occurred.

## IV. THE COURTS BELOW MISAPPLIED *Penn Central Transp. Co. v. New York City*, 498 U.S. 104 (1978)

The Superior Court and Appellate Division did not apply the standards established by this Court in *Penn Central Transp. Co. v. New York City*, 498 U.S. 104 (1978).

In *Penn Central*, the United States Supreme Court established standards to determine whether a compensable taking has occurred. The most important of these factors or standards are the "economic" impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. Under *Penn Central*, a court is required to make an *ad hoc inquiry* based upon particular facts of the case in determining whether a taking has occurred where government action diminishes, but does not destroy all of the value of the property.

Although *Penn Central* involved the impact of government regulation, the principals enunciated in *Penn Central* are equally applicable to this case.

The Superior Court and Appellate Division did not conduct an *ad hoc* hearing to determine the impact of the State's actions on Petitioner or the extent to which such actions interfered with Petitioner's distinct investment-backed expectations. Had such a hearing been held, the record clearly establishes that the State's actions interfered with Petitioner's distinct investment-backed expectations.

The undisputed facts in this case are that

1. NYF was a Tenant in Petitioner's building since 1976.

2. But for the actions of the State, NYF would have continued to be a Tenant in Petitioner's building under a lease agreement whose term would expire on December 31, 2009.

3. In order to move from Petitioner's building to another location, NYF needed at least one year during which time, it would have to pay rent to Petitioner and occupancy costs for the new location.

4. It would cost NYF approximately Five Million Dollars to relocate.

5. NYF could not fund the Five Million Dollars of moving costs without securing bank financing. Its bank would only provide the financing if it had an acceptable guarantee from a third party that it would pay NYF the relocation costs when the relocation was completed.

6. To economically justify relocating, NYF would have to save Five Million Dollars in occupancy costs, which exceeded the rent it would have paid Petitioner during the entire renewal period.

In 1999, when Petitioner and NYF amended their lease and Petitioner agreed to grant NYF an option to renew the lease to December 31, 2009, Petitioner knew the nature of NYF's business, the time it would

take to complete a relocation and the enormous costs associated with such a move. Based on this knowledge, and its twenty-five year history with NYF, Petitioner had a reasonable and distinct investment-backed expectation that NYF would remain a Tenant in its building for as long as it continued in business.

There is no question that the State's actions directly caused a termination of NYF's tenancy. The State's actions had a direct and substantial impact on Petitioner and clearly interfered with its distinct, reasonable investment-backed expectations that it would continue to receive rental income from NYF at least until December 31, 2009. Applying the standards and factors enunciated in *Penn Central*, there is no question that a compensable taking occurred.

## CONCLUSION

For the reasons set forth above, this Court should grant a Writ of Certiorari to review the actions of the Courts below.

Respectfully submitted,

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0057-06T1

RAR DEVELOPMENT ASSOCIATES,

Plaintiff-Appellant,

v.

NEW JERSEY SCHOOLS CONSTRUCTION CORPORATION and NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,

Defendants-Respondents,

and

NEW YORK FOLDING BOX COMPANY,

Defendant.

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Argued October 31, 2007 – Decided July 9, 2008

Before Judges Cuff, Lisa and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9424-05.

W. Lane Miller argued the cause for appellant (Law Offices of W. Lane Miller and Lum, Danzis, Drasco & Positan, LLC, attorneys; Mr. Miller, of counsel; Dennis J. Drasco, of counsel and on the brief; Kevin J. O'Connor, on the brief).

Dale Laster Lessne, Deputy Attorney General, argued the cause for respondents

(Anne Milgram, Attorney General, attorney; Michael J. Haas, Assistant Attorney General, of counsel; Ms. Lessne, on the brief).

PER CURIAM

Plaintiff, RAR Development Associates, appeals from the summary dismissal of its claims against defendants New Jersey Schools Construction Corporation and New Jersey Economic Development Authority.[1] The complaint alleged that the actions of these government agencies caused plaintiff to suffer the loss of a long-term tenant at the end of 2004. This conduct provided the factual basis for counts alleging tortious interference with contract, tortious interference with a prospective economic advantage, and a "taking" without just compensation. The trial court rejected these claims, as well as plaintiff's argument that the State should be estopped from avoiding responsibility for damage it caused.

We agree with the trial court that there was no compensable taking in this case, and that the record does not support plaintiff's tortious interference and equitable estoppel claims. Accordingly, we affirm.

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[1] The NJEDA created the NJSCC as a subsidiary organization in August 2002 to oversee the acquisition of properties for school construction projects. At that point, the NJSCC assumed the duty to negotiate with plaintiff from the NJEDA, the agency that instituted the project discussed below. We refer to these agency defendants collectively as "the State."

I

Because the case comes to us by virtue of a summary judgment, we recite the facts applying the *Brill*[2] standard, in the light most favorable to plaintiff. Plaintiff owned property in Newark, consisting of two contiguous lots. Lot 1.02, comprising about one and one-half acres, was vacant. Lot 1.01 contained seven interconnected buildings comprising about 725,000 square feet. Prior to 2003, plaintiff leased about 472,000 square feet to six tenants, who used their respective spaces for manufacturing and storage purposes.

New York Folding Box Company (NYF) held the largest leasehold interest. NYF's use of its space, about 109,000 square feet, dated to at least 1976.[3] NYF renewed its lease periodically. Under the terms of a December 30, 1999 amendment to the most recent lease, NYF agreed to continue its occupation of the premises through December 31, 2004. NYF retained an option to renew the lease for an additional five-year term beyond that end date at a specified rental. The amendment required NYF to exercise its renewal right by May 15, 2004.

In March 2002, the State notified plaintiff of its intention to acquire Lot 1.01 for the construction of

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[2] *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995).

[3] When plaintiff acquired the property in 1979, NYF was a tenant and its lease was assigned to plaintiff.

Newark East Side High School. Representatives of the State visited the buildings' tenants, including NYF, in October of that year to discuss the possible condemnation and to assess their relocation needs.

The State caused an appraisal to be conducted, which resulted in a valuation for the improved property of $17.5 million. On July 10, 2003, the State officially offered that amount to plaintiff for the purchase of the property.[4] Plaintiff declined the offer.

In the succeeding weeks, the State notified the tenants that the building would be under its control by January 1, 2005, at which time it expected to proceed with demolition. It informed the tenants that the State's relocation consultant would be available to explain the process and "the rights, benefits and moving reimbursement to which [the tenants] may be entitled under the law." The State advised the tenants to continue paying their rent.

NYF's operation included the use of substantial industrial machinery. NYF advised the State that the movement of this machinery to a new location would require at least one year, during which the presence of two technicians from the manufacturer of the machines would be required to oversee the dismantling, transporting, and reassembling of the machinery. The cost would also be substantial. To

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[4] It is apparent that the State also made an offer to purchase plaintiff's vacant parcel, Lot 1.02, supported by a separate appraisal.

minimize the disruption to its business, NYF began searching for a new location.

It found a potential new location in Mt. Olive, and informed the State, which assured NYF appropriate relocation assistance would be given, consistent with the relevant statutory and regulatory provisions. The relocation officer expressed the State's continued hope to acquire the property without litigation, but added that "if negotiations prove fruitless the case will proceed to final condemnation if necessary, with [the State] ultimately owning the property in the very near future."

NYF subsequently changed its new location to one in Stanhope. To facilitate its move, NYF required financing. As a condition of that financing, the lender required NYF to produce a written guarantee from the State that it would pay relocation assistance. NYF obtained an estimate for its relocation costs in the amount of $5,039,100.62, which was approved by the State's relocation consultant. Accordingly, on November 6, 2003, the State issued a written assurance that it would reimburse NYF for relocation expenses not to exceed that sum. The lender approved the loan, and the dismantling of NYF's machinery commenced.

As NYF took these preparatory steps, the State continued to negotiate the acquisition of the property with plaintiff. The negotiations were unsuccessful. The State reevaluated its position and determined to abandon its attempt to acquire plaintiff's improved

lot, and instead to acquire only the unimproved lot, upon which it would construct the new school facility. The State informed plaintiff of its decision on April 20, 2004.[5]

The State notified plaintiff's tenants of its decision and advised them they would be able to remain in the property. Of course, NYF's relocation activities were well underway by that time. Recognizing that there was proper official authorization for NYF's actions, the State agreed to permit NYF to complete its relocation, to be paid for by the State in accordance with its guarantee.

NYF failed to renew its lease by the May 15, 2004 deadline. As contemplated, its move took about one year, and it completed its relocation on November 18, 2004.[6] The State paid NYF about $5 million as reimbursement for its moving costs. Plaintiff claimed an inability to replace NYF with another tenant. The State disclaimed any obligation to compensate plaintiff for the loss of future rental payments occasioned by NYF's departure.

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[5] The State later filed a condemnation action with respect to Lot 1.02, the unimproved lot. No aspect of that proceeding is relevant to this appeal.

[6] The parties agree that NYF continued to pay its monthly rent through November 2004. Plaintiff and NYF dispute whether NYF paid the last month of rent, and whether NYF undertook other contractual obligations unrelated to this appeal.

Plaintiff filed this action on November 21, 2005. It alleged that the State's actions amounted to tortious interference with plaintiff's lease agreements, and that the inducements given to NYF to vacate the building effected an unconstitutional "taking." The matter came before the trial court on cross-motions for summary judgment. The court granted the State's motion and dismissed the complaint. The court denied plaintiff's cross-motion for partial summary judgment seeking a determination that the State's actions constituted a taking as a matter of law. After denying plaintiff's reconsideration motion, the court entered judgment on July 21, 2006 in favor of defendants, and certified its orders as final on August 28, 2006. This appeal followed.

II

Plaintiff argues that the trial court erroneously dismissed the tortious interference claims. It argues that NYF would have renewed the rental agreement for an additional five-year term but for the State's decision to subsidize NYF's relocation. The State, plaintiff alleges, should have known that this inducement would cause damage to plaintiff. It follows that the State should bear the burden to cover such damage.

The State argues that the Tort Claims Act does not carve out an applicable exception to the general rule of immunity. Even assuming that the common

law immunity from suit does not apply here, the State argues that plaintiff's allegations do not set forth cognizable tortious interference claims. We agree with the State.

As an initial matter, viewing the facts in the light most favorable to plaintiff, we assume that NYF would have renewed its lease with plaintiff for an additional five years but for the State's actions and representations.

To set forth a cognizable claim for tortious interference with contract, plaintiff must demonstrate that the State intentionally interfered with plaintiff's contract without justification, and that the interference caused damage. *214 Corp. v. Casino Reinv. Dev. Auth.*, 280 N.J. Super. 624, 628 (Law Div. 1994).

To prevail on a claim for tortious interference with a prospective economic advantage, "plaintiff must show that it had a reasonable expectation of economic advantage that was lost as a direct result of defendants' malicious interference, and that it suffered losses thereby." *Lamorte Burns & Co. v. Walters*, 167 N.J. 285, 305-06 (2001). As with the tortious interference with contract claim, "malicious interference" will be found only when "harm was inflicted intentionally and without justification or excuse." *Id.* at 306.

We conclude that the State did not act with the requisite bad intent, or without justification, in its negotiations with NYF. The State sought to acquire

plaintiff's improved lot in order to construct a new public high school. Consistent with the Eminent Domain Act, the State attempted to acquire title or possession from plaintiff through "bona fide negotiations" and an appropriate written offer. N.J.S.A. 20:3-6. Assuming plaintiff accepted the written offer, or the State acquired the property at a later time through the filing of a condemnation action and a declaration of taking, NYF would have been entitled to relocation assistance payments under N.J.S.A. 20:4-4a and N.J.A.C. 5:11-3.9(a). Under the relevant regulations, however,

> Whenever a displacing agency determines that their activities shall cause a displacement of individuals or businesses that are eligible for relocation payments and assistance, the displacing agency shall notify those individuals and businesses, in writing, *at the earliest possible date* of the benefits and obligations of the Act and this chapter. Said notice *shall be issued immediately upon the determination of the displacing agency that displacement shall occur*. . . .
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> [N.J.A.C. 5:11-4.2 (emphasis added).]

And, an additional regulation provides that the "eligibility date" for the provision of relocation assistance payments is "the date of the first written offer to purchase the property." N.J.A.C. 5:11-2.2(c).

The State dutifully followed these statutes and regulations. It discussed the possible condemnation of the property with the tenants prior to the receipt of

the real estate appraisal. About two weeks after the State forwarded the written offer of purchase to plaintiff, it concluded that these activities would result in the displacement of plaintiff's tenants, including NYF. *214 Corp., supra,* 280 N.J. Super. at 632. Accordingly, the State revisited the earlier discussions with the tenants concerning the provision of relocation assistance benefits. Within the unique circumstances of this case, however, NYF required about one year to find an alternate location and to dismantle and move its complex machinery. There is no evidence that the State, at that time, did not wish to acquire the improved property from plaintiff in order to construct the high school. The project parameters required that some type of special accommodation be given to NYF. As such, the State agreed to pay NYF's moving expenses.

Against this background, we conclude, as a matter of law, that the State's conduct did not constitute "malicious interference." The trial court did not err in dismissing the tortious interference counts.

III

Plaintiff alleges that the State induced NYF to vacate the building, without plaintiff's knowledge, despite the recognized duty to treat private parties with fundamental fairness. It argues that the State's course of conduct warrants the application of equitable estoppel. We disagree.

An equitable doctrine, estoppel is "founded in the fundamental duty of fair dealing imposed by law, that prohibits a party from repudiating a previously taken position when another party has relied on that position to his detriment." *State v. Kouvatas,* 292 N.J. Super. 417, 425 (App. Div. 1996). To succeed on an equitable estoppel claim, the plaintiff must prove that the party to be estopped "engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment." *Knorr v. Smeal,* 178 N.J. 169, 178 (2003) (citing *Miller v. Miller,* 97 N.J. 154, 163 (1984)).

Although the doctrine of equitable estoppel should not be applied as readily against the public as against a private entity, it can be applied against a public body "where the interests of justice, morality and common fairness clearly dictate that course." *Gruber v. Mayor & Twp. Comm. of Raritan,* 39 N.J. 1, 13 (1962). There is no requirement that the public body act with a fraudulent intent. "'If the conduct works an unjust or inequitable result to the person it was designed to influence, the doctrine is applicable.'" *Widmer v. Twp. of Mahwah,* 151 N.J. Super. 79, 85 (App. Div. 1977) (quoting *N.J. Suburban Water Co. v. Town of Harrison,* 122 N.J.L. 189, 196 (E. & A. 1939)).

The record contains a number of statements by plaintiff to the effect that the State negotiated with the tenants without plaintiff's knowledge. According to plaintiff, the State, in the second half of 2003,

either represented to the tenants that the acquisition of the improved property was a certainty or directed the tenants to relocate. Plaintiff disclaims any knowledge of these negotiations until the publication of an article in the Newark Star-Ledger in March 2005, more than three months after NYF completed its relocation and two months after the end of the lease agreement.

Given these undisputed facts, it is clear that the State's actions did not induce detrimental reliance on the part of plaintiff. Plaintiff's submissions, to the extent they argue that the State's actions were taken with the intention that plaintiff's tenants, rather than plaintiff itself, rely on them, demonstrate that this is the case. Because the undisputed facts cannot support the conclusion that plaintiff relied to its detriment on the State's conduct, *Summer Cottagers' Ass'n of Cape May v. City of Cape May,* 19 N.J. 493, 503-04 (1955), we agree with the trial court's rejection of plaintiff's equitable estoppel argument.

IV

We now address plaintiff's takings claim. To remedy the State's alleged destruction of the lease agreement with NYF, plaintiff sought an award of "just compensation." Rejecting the claim, the trial court stated:

> [T]his is a troublesome case under the particular fact pattern presented, but the first thing that I'll start with is the question

> of whether or not there was a taking, and as I do read the case law . . . to be a taking there has to be a substantial diminution of the value to virtually render the property valueless, which I don't think was the case here.
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> The [NYF] space was I guess approximately a quarter of the building, may not have quite been that. But it certainly, their leaving didn't destroy the building itself, and I don't think really destroyed the value of that space. It did have value as property that could be leased, if not to [NYF], to somebody else.

The gravamen of plaintiff's inverse condemnation argument is that the State's actions deprived plaintiff of its property rights under its lease with NYF and should be deemed a taking of that leasehold interest, as a result of which plaintiff should be compensated for its loss of expected income under the lease (subject to plaintiff's obligation to mitigate damages by making its best efforts to re-rent the space). The State initially argues that plaintiff held no compensable property interest in NYF's option to renew its lease and to future rental income it would provide. Alternatively, the State argues that even if the option to renew were deemed a compensable property interest, the State's actions did not constitute a taking. We agree with the State on both points, which we will discuss in that order.

A.

The threshold question is whether plaintiff's expectation that the lease would be renewed constitutes a protected property interest, the "taking" of which requires an award of "just compensation" from the State. Stated differently, we consider whether the Fifth Amendment requires the State to compensate plaintiff for the dashed expectation that NYF would renew the lease.

The Federal and New Jersey Constitutions mandate that private property shall not be "taken" for public use without just compensation. U.S. Const. amend. V; N.J. Const. art. I, ¶ 20; *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,* 166 U.S. 226, 236, 17 S. Ct. 581, 584, 41 L. Ed. 979, 984 (1897) (applying the language of the Fifth Amendment to the States through the Fourteenth Amendment). It is axiomatic that the proponent of a takings claim must possess a "property interest" cognizable under the Fifth Amendment. *Phillips v. Wash. Legal Found.,* 524 U.S. 156, 164, 118 S. Ct. 1925, 1930, 141 L. Ed. 2d 174, 183 (1998) (applying the definition of "property" developed in due process cases to takings cases); *Story v. Green,* 978 F.2d 60, 62 (2d Cir. 1992). It is equally clear that, even though the interest "may take many forms over and above the ownership of tangible property," *Nicoletta v. N. Jersey Dist. Water Supply Comm'n,* 77 N.J. 145, 154 (1978), the range of protected property interests is not limitless. *Bd. of Regents v. Roth,* 408 U.S. 564, 570-72, 92 S. Ct. 2701, 2705-06, 33 L. Ed. 2d 548, 556-58 (1972). The

determinative question continues to be whether the claimant possesses a "legitimate claim of entitlement," not merely an "abstract need or desire" or "unilateral expectation," in the interest. *Id.* at 577, 92 S. Ct. at 2709, 33 L. Ed. 2d at 561. These entitlements "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ibid.*

Contractual arrangements are an additional independent source of these entitlements. *Lynch v. United States,* 292 U.S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434, 1440 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."). However, to create a protected property interest, the contract must establish rights more substantial in nature than the mere expectation of continued benefits. Our task is to assess the entitlements created by the contract between plaintiff and NYF.

The inclusion in a lease agreement of an express option to renew grants the tenant the right to extend the landlord-tenant relationship at its election. The taking of this right triggers the government's responsibility to provide just compensation to the tenant. *United States v. Petty Motor Co.,* 327 U.S. 372, 380-81, 66 S. Ct. 596, 601, 90 L. Ed. 729, 736 (1946). But no interest attaches to the mere expectation, based on past experience, that the landlord will renew the lease. The Court noted that the fact that some tenants-at-will in that case "had occupied their leaseholds by mutual consent for long

periods of years does not add to their rights." *Id.* at 380 n.9, 66 S. Ct. at 601 n.9, 90 L. Ed. at 736 n.9. Quoting Justice Holmes' opinion in a turn-of-the-century Massachusetts case, the Court concluded that "'[c]hangeable intentions are not an interest in land,'" and, notwithstanding a course of dealing establishing that the landlord and tenants were "'likely to keep on together,'" the landlord's likely intention to renew "'added nothing to the tenants' legal rights, and *legal rights are all that must be paid for.*'" *Ibid.* (emphasis added) (quoting *Emery v. Boston Terminal Co.*, 59 N.E. 763, 765 (Mass. 1901)).

The Tenth Circuit reached the same conclusion in *Scully v. United States,* 409 F.2d 1061, *cert. denied,* 396 U.S. 876, 90 S. Ct. 152, 24 L. Ed. 2d 134 (1969). The tenant argued that the "fair market value" of his seized leasehold interest should have accounted for the expectation that the landlord would renew the lease. *Id.* at 1063. The lease did not provide for unconditional renewal. The court concluded that "the lessee of a one year term is not entitled to recover the market value added by a mere expectation that the lease will be renewed." *Id.* at 1065.

The Supreme Court of Alaska provided similar insight in *Stroh v. Alaska State Housing Authority,* 459 P.2d 480, 482 (1968):

> A tenant's right of renewal of a lease refers to a legal right, and this exists only when the lease expressly grants to the tenant the option to renew the lease at the end of its term. A mere expectation, or even

> probability, that the lease will be renewed based upon past practice and present good relations between landlord and tenant, is not a legal right of renewal. It is nothing more than a speculation on chance. *Intentions which are subject to change at the will of a landlord do not constitute an interest in land so as to confer upon the tenants something to be valued and compensated for in a condemnation action.*
>
> [Emphasis added.]

The Supreme Court considered a unique application of this principle in *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973). There, the lessee constructed a number of improvements on the leased property. When the government acted to take the property, including the improvements, the lessee argued that the fair market value of the improvements should reflect the purchaser's expectation that the lease would be renewed and that the useful life of the improvements would extend beyond the remaining seven and one-half years of the lease term. *Id.* at 471-73, 93 S. Ct. at 793-94, 35 L. Ed. 2d at 6-7. The majority, in a 5-4 opinion, agreed with this argument.

This opinion, however, did not disturb the earlier conclusion that there was no reason "to elevate an expectation of renewal into a compensable legal interest." *Id.* at 476, 93 S. Ct. at 795, 35 L. Ed. 2d at 9. As Justice Rehnquist's dissent noted, "[e]ven in its

sharply limited reading of [*Petty Motor*] the Court concedes that the petitioner's expectation of having its lease renewed upon expiration is not itself an interest in property for which it may be compensated." *Id.* at 481, 93 S. Ct. at 798, 35 L. Ed. 2d at 12 (Rehnquist, J., dissenting). The majority opinion, and the case law that followed, suggest that the *Almota* holding should be limited to the calculation of the fair market value of leasehold improvements. *Id.* at 476, 93 S. Ct. at 795-96, 35 L. Ed. 2d at 9 (majority opinion); *United States v. 27,223.21 Acres of Land,* 589 F. Supp. 1121, 1126 (D. Colo. 1984); *State ex rel. Miller v. Gannett Outdoor Co. of Ariz., Inc.,* 795 P.2d 221, 224 (Ariz. Ct. App. 1990).

We recognize that these cases address the legal protections afforded to the tenant's expectations of renewal, not the landlord's expectations that the tenant will choose to exercise its contractual right to renew. However, we see no reason to treat the latter situation in dissimilar manner. The underlying rationale is the same.

The lease agreement in this case does not grant plaintiff the right to force NYF to renew the lease. Absent this power, plaintiff had only an expectation, however probable it may have been, that NYF would elect to extend the rental agreement. Upon this election, there would have been a new contract with new obligations. Without this election, however, there was only a mere expectation on plaintiff's part of continued benefits. The fact that plaintiff had an interest in the continued operation of the prior lease

does not mean that it held a protected interest in the renewal of the lease.

We hold that the landlord's expectation that the tenant will exercise the right of renewal does not confer on the landlord a recognized property interest subject to just compensation for its taking. Our assumption under the *Brill* standard that NYF would have renewed the lease but for the State's good faith efforts to acquire the improved property does not alter our conclusion that the Fifth Amendment does not protect this expectation. Unless and until the tenant actually exercised its renewal option, the landlord held no contractual right to the extended lease term. Hindsight cannot transform what could have happened into what would have happened but for the State's actions. Even if NYF can now say with assurance that it would not have moved without the State's inducement, it could not have been so assured prior to the renewal deadline. Other circumstances could well have induced NYF to refrain from renewing. Even if that was an unlikely prospect, it reflects the fundamental difference between an expectation and a right.

B.

Although our determination that plaintiff held no compensable property interest in NYF's option to renew the lease is dispositive of the appeal, we nevertheless, for the sake of completeness, address whether, even if the option to renew granted plaintiff

a compensable property interest, the State's actions constituted a taking.

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 2081, 161 L. Ed. 2d 876, 887 (2005). A taking may also occur, however, through the exercise of the power to regulate property rights, if the regulation "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922); *Devines v. Maier*, 665 F.2d 138, 141 (7th Cir. 1981). Under the Supreme Court's more recent iteration of this rule, a "regulatory taking" may be found if the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle, supra*, 544 U.S. at 537, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887.

There are two circumstances in which the nature of the government regulation requires courts to find a so-called "categorical" or "per se" taking. The first arises from the government's use of regulation to compel a property owner to suffer a permanent physical invasion, however minor, of his or her property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868, 876 (1982) (holding that New York law requiring landlord to permit cable company to place wires and equipment, the latter occupying about one and one-half cubic feet, on the roof of the landlord's property worked a permanent physical occupation and thus constituted a compensable

taking). This is because the regulation effectively destroys the rights associated with ownership of property: the right to possess, the right to use, the right to dispose, and the right to exclude others. *Id.* at 435-36, 102 S. Ct. at 3175-76, 73 L. Ed. 2d at 882-83.

The second arises from regulations denying the property owner "all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 813 (1992). The Court set forth this rule within the context of state regulation banning construction in an ecologically fragile coastal zone. The Court noted that the regulation, "by requiring land to be left substantially in its natural state," effected an unconstitutional taking. *Id.* at 1018-19, 112 S. Ct. at 2894-95, 120 L. Ed. 2d at 814-15.

It is clear that the facts of this case cannot support the finding of either a "paradigmatic" or "categorical" taking. Plaintiff concedes that the State did not cause either itself or a third party to take physical possession, however minor, of any of its property. Nor did the State's action deprive plaintiff of all productive use of its property. Plaintiff was not deprived of the right to lease the property to another tenant. The most beneficial use of the property remained unencumbered.

According to plaintiff, however, the trial court erroneously limited its analysis to whether there was a complete denial of the property's economic use.

Plaintiff asks us to apply the flexible test articulated by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), to conclude that the State's actions effected a de facto taking. Applying this standard, we conclude there was no unconstitutional taking as a matter of law.

The Supreme Court continues to espouse the view that "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred." *Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592, 607 (2001). To consider whether a limitation on land use constitutes a taking, we consider "the magnitude of [the] regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle, supra,* 544 U.S. at 540, 125 S. Ct. at 2082, 161 L. Ed. 2d at 889. This approach "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido,* 503 U.S. 519, 523, 112 S. Ct. 1522, 1526, 118 L. Ed. 2d 153, 162 (1992).

Eschewing the use of a set formula to determine when "justice and fairness" require the government to provide just compensation for its actions, the Court identified several factors to serve as the guideposts of any noncategorical takings analysis in *Penn Central, supra,* 438 U.S. at 124, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648. These factors include the character of the governmental action, the economic impact of the

regulation, and the regulation's interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S. Ct. 383, 390, 62 L. Ed. 2d 332, 343 (1979). This approach requires courts to conduct an "essentially ad hoc" factual inquiry specific to the particular circumstances of the case. *Ibid.* The courts of this State recognize the fact-sensitive nature of this approach. *See, e.g., Bernardsville Quarry, Inc. v. Borough of Bernardsville,* 129 N.J. 221, 232 (1992) ("The determination of whether a regulatory measure effectuates the taking of property requires a multi-factor balancing test. . . ."); *Rieder v. State Dep't of Transp.,* 221 N.J. Super. 547, 554 (App. Div. 1987) ("It must be borne in mind that commonly resolution of constitutional questions concerning inverse condemnation represents no more than a value judgment upon a given factual complex rather than an evident application of a precise rule of law.").

Plaintiff argues that the parcel alleged to be "taken" in this case was the part of the building rented by NYF, or, more precisely, plaintiff's leasehold interest in that parcel. Whether there has been a substantial denial of a property's economic use depends on the definition of the property interest. *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497, 107 S. Ct. 1232, 1248, 94 L. Ed. 2d 472, 496 (1987). Starting with *Penn Central, supra,* the Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and

> attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .
>
> [438 U.S. at 130-31, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652.]

This approach was applied in *Keystone Bituminous Coal, supra,* to reject the plaintiffs' argument that a statutory restriction on the mining of particular coal was an unconstitutional taking. Even though the complaint set forth a facial challenge to the statute, the Court considered the application of the statute to about twenty-seven million tons of coal. 480 U.S. at 495-97, 107 S. Ct. at 1247-48, 94 L. Ed. 2d at 495-96. The Court concluded that there was "no basis for treating the less than 2% of petitioners' coal as a separate parcel of property." *Id.* at 498, 107 S. Ct. at 1249, 94 L. Ed. 2d at 497. It reasoned:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place.

[*Id.* at 498, 107 S. Ct. at 1248, 94 L. Ed. 2d at 496.]

The Court reiterated in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 644, 113 S. Ct. 2264, 2290, 124 L. Ed. 2d 539, 578 (1993), that the takings claimant cannot subdivide the parcel of property "into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." It noted, "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Ibid.*

The courts of this State, and other states, follow this approach. *See East Cape May Assocs. v. State Dep't of Envtl. Prot.,* 343 N.J. Super. 110, 126-29 (App. Div.) (agreeing with the trial court's definition of the affected "property"), *certif. denied,* 170 N.J. 211 (2001); *Karam v. State Dep't of Envtl. Prot.,* 308 N.J. Super. 225, 236-40 (App. Div. 1998) (refusing to conclude that riparian part of the plaintiffs' land was the affected "parcel"), *aff'd o.b.,* 157 N.J. 187, *cert. denied,* 528 U.S. 814, 120 S. Ct. 51, 145 L. Ed. 2d 45 (1999). *See also Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.,* 636 So. 2d 761, 765 (Fla. Dist. Ct. App.) (noting that the state regulation affected only forty-eight acres of the "undivided whole" of 173 acres), *review denied,* 645 So. 2d 452 (Fla. 1994); *Coast Range Conifers, LLC v. Or. State Bd. of Forestry,* 117 P.3d 990 (Or. 2005) (addressing

the prohibition against logging on nine acres of the plaintiff's forty-acre parcel).

At first blush, the case law suggests that plaintiff cannot define the relevant property interest as the small portion of the building previously rented to NYF. There are no facts to support the conclusion that the 109,000 square foot section should be treated as the whole "parcel" for the purposes of our *Penn Central* analysis. However, we need not resolve this issue because, even assuming that the particular cross-section of the improved property leased to NYF represents the "denominator" in the takings analysis, application of the *Penn Central* factors does not lead to the relief plaintiff seeks.

The character of the governmental action factor focuses primarily on whether the conduct "amounts to a physical invasion." *Lingle, supra,* 544 U.S. at 539, 125 S. Ct. at 2082, 161 L. Ed. 2d at 888. At the far end of the spectrum, the *Loretto* Court recognized the detrimental effect of the government's "permanent physical occupation of property" on the right to possess and use one's property to the exclusion of others. "[W]hen the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto, supra,* 458 U.S. at 434-35, 102 S. Ct. at 3175, 73 L. Ed. 2d at 882 (citation omitted). *See also Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825,

832, 107 S. Ct. 3141, 3146, 97 L. Ed. 2d 677, 686 (1987) (concluding that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed"); *Hendler v. United States,* 952 F.2d 1364, 1374-76 (Fed. Cir. 1991) (concluding that the government's installation of groundwater surveillance wells on the plaintiff's property, and ability to enter plaintiff's property to check these wells as it pleased, effected a permanent physical occupation, as the government essentially became a "co-tenant-in-possession").

Short of permanent physical occupation, it is clear that the government retains the broad discretion "to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto, supra,* 458 U.S. at 440, 102 S. Ct. at 3178, 73 L. Ed. 2d at 885. This broad discretion encompasses the right to impose rent control ordinances, within reason, to protect particular groups of tenants. *Pennell v. City of San Jose,* 485 U.S. 1, 12 n.6, 108 S. Ct. 849, 857 n.6, 99 L. Ed. 2d 1, 14 n.6 (1988) (refusing the invitation to find that the enactment of rent control ordinances constitutes a per se taking); *Hutton Park Gardens v. Town Council of W. Orange,* 68 N.J. 543, 565-72 (1975) (noting that rent and price controls are not unconstitutionally "confiscatory" so long as they permit a "just and reasonable" return).

As a number of courts have noted, however, this broad discretion does not include the right to force landlords to house tenants not of their choosing. *See, e.g., Cienega Gardens v. United States,* 331 F.3d 1319, 1337-39 (Fed. Cir. 2003) (noting the impermissible effect of the government's restriction on the landlord's right to exclude government-approved, low-income holdover tenants); *ConocoPhillips Co. v. Henry,* 520 F. Supp. 2d 1282, 1312-15 (N.D. Okla. 2007) (finding that a statute requiring employers to permit individuals with firearms to enter their property resulted in significant deprivation of the employers' right to exclude); *Ross v. City of Berkeley,* 655 F. Supp. 820, 837 (N.D. Cal. 1987) (finding that the challenged enactment gave tenants "a leasehold interest of indefinite duration"). Of course, the State's conduct in this case did not result in plaintiff's forced acceptance of unwanted tenants. The State did not compel plaintiff over objection to rent its property or to refrain from terminating a tenancy.

Plaintiff likens the State's action in this case to the precondemnation activities discussed in *Washington Market Enterprises, Inc. v. City of Trenton,* 68 N.J. 107 (1975). The city in that case acquired property in 1963 in order to construct a downtown shopping mall. *Id.* at 111. It did not issue a blight declaration, but the plaintiff, an owner of a nearby multi-tenant commercial building, alleged that this preliminary activity, and the statements of public officials about the future condemnation of the entire area, caused its tenants to leave. *Id.* at 111-12.

Plaintiff's property, and the surrounding land, was ultimately declared a blighted area in 1967. *Id.* at 111. The plaintiff's temporary tenants vacated and the area's economic vitality collapsed. *Id.* at 112. The city did not condemn the plaintiff's property, however, and, when the city abandoned the project in 1973, the plaintiff's property was virtually worthless. *Ibid.* Under the Court's prior precedent, the declaration of blight would not have worked a taking, and the absence of an official condemnation action would have precluded the plaintiff's recovery of damages. *Id.* at 113-15.

The Court nonetheless concluded that, even though a declaration of blight does not, in and of itself, constitute a taking, there could be a compensable taking "where, in addition to the declaration of blight, other related activities together with the passage of time are said to have shorn property of literally all or most of its value." *Id.* at 115. The statutory authority for the government's right to abandon a redevelopment project even after a declaration of blight could not insulate it "from the obligation to make just compensation in those instances where its activities have already practically destroyed the beneficial use of a particular property." *Id.* at 115-16. The Court remanded the matter to determine whether there was a taking, with the recognition that "where planning for urban redevelopment is clearly shown to have had such a severe impact as substantially to destroy the beneficial use which a landowner has made of his property, then there has been a 'taking of property'

within the meaning of that constitutional phrase." *Id.* at 110.

We do not think the circumstances in this case rise to that level. The governmental action here consisted of a good faith effort by the State to act within the confines of the relevant statutory sections and administrative regulations to acquire property for the construction of a school. Extended lead time was needed for NYF's relocation, and the orderly process of the intended acquisition of plaintiff's improved property necessitated its early provision of relocation assistance. And, the State's conduct did not cause a substantial destruction of the property's beneficial use.

As the United States Supreme Court noted in 2005, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle, supra,* 544 U.S. at 540, 125 S. Ct. at 2082, 161 L. Ed. 2d at 888-89. This language suggests that the takings claimant must show, as a threshold matter, "'serious financial loss' from the regulatory imposition in order to merit compensation." *Cienega Gardens, supra,* 331 F.3d at 1340 (citation omitted). "[A]t bottom what emerges is at least the basic notion that the government, under the guise of regulation, cannot take from a property owner the core economic value of the property, leaving the owner with a mere shell of shambled expectations." *Hendler, supra,* 952 F.2d at 1373.

The New Jersey Supreme Court summarized:

> Diminution of land value itself does not constitute a taking. Similarly, impairment of the marketability of land alone does not effect a taking. Also, restrictions on uses do not necessarily result in takings even though they reduce income or profits. A regulatory scheme will be upheld unless it denies "all practical use" of property, or "substantially destroys the beneficial use of private property," or does not allow an "adequate" or "just and reasonable" return on investment[.]
>
> [*Gardner v. N.J. Pinelands Comm'n,* 125 N.J. 193, 210-11 (1991) (citations omitted).]

We conclude that the evidential materials, read in the light most favorable to plaintiff, fail to demonstrate that the challenged conduct substantially deprived plaintiff's property of beneficial use. Plaintiff retains the freedom to rent its commercial space to other prospective tenants. We find no significance in the fact that there has been an allegedly premature end to the contractual history between plaintiff and NYF. The federal and state constitutions do not guarantee the most profitable use of property. *See Andrus v. Allard,* 444 U.S. 51, 66, 100 S. Ct. 318, 327, 62 L. Ed. 2d 210, 223 (1979) ("[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim."); *East Cape May Assocs., supra,* 343 N.J. Super. at 138. This is especially so when NYF did not exercise the right to

renew within the prescribed time, and plaintiff knew nothing of the government's negotiations with NYF until March 2005.

We rely as well on the "bundle of rights" concept explained in *Allard, supra.* There, the Court rejected a challenge to regulations permitting the possession, but not the sale, of the parts, nests, or eggs of bald eagles and other migratory birds acquired prior to the effective date of two conservation statutes. 444 U.S. at 52-54, 100 S. Ct. at 320-21, 62 L. Ed. 2d at 214-15. The plaintiffs, owners of bird artifacts, argued that the regulations deprived them of "the opportunity to earn a profit from those relics." *Id.* at 64, 100 S. Ct. at 326, 62 L. Ed. 2d at 222.

The Court disagreed. Even though the regulations restricted one means of disposing of the items, the Court noted that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66, 100 S. Ct. at 327, 62 L. Ed. 2d at 222-23. The Court stated that the owners retained "the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66, 100 S. Ct. at 327, 62 L. Ed. 2d at 223.

This approach explains the Court's conclusion that restrictions on the plaintiff's ability to construct a multistory office building in *Penn Central, supra,*

438 U.S. at 130, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652, and the plaintiffs' ability to exploit the "support estate" in *Keystone Bituminous Coal, supra,* 480 U.S. at 500-01, 107 S. Ct. at 1249-50, 94 L. Ed. 2d at 497-98, did not constitute "takings" of the respective "air rights" and rights in the "support estate." Insofar as the right to lease represents one strand of the bundle of rights attaching to fee simple ownership, we conclude that the loss of plaintiff's right to lease this subsection of its building to NYF does not effect a taking. The State did not destroy plaintiff's right to lease, possess of [sic] otherwise use this space.

We also liken the facts in this case to those in *767 Third Avenue Associates v. United States,* 48 F.3d 1575 (Fed. Cir. 1995). The landlord in that case leased three sections of an office building to various organizations of the Yugoslavian socialist government. *Id.* at 1576. Due to ethnic strife in the Yugoslavian republics, the United States government blocked the property interests, and froze the assets, of the Yugoslavian government in the United States. *Id.* at 1577. Following this asset freeze, the Yugoslavian officials terminated their lease agreements. *Ibid.*

The landlord argued that the federal government's action constituted a regulatory taking. *Id.* at 1578. Even though the Federal Circuit concluded that there could be no reasonable investment-backed expectations in the continued contractual relationship with a foreign entity, *id.* at 1580-81, we highlight the court's additional conclusion that "no taking occurs when . . . expectations under a contract are

merely frustrated by lawful government action not directed against the takings claimant." *Id.* at 1581 (citing *Omnia Commercial Co. v. United States,* 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773 (1923)). Even assuming that plaintiff enjoyed a reasonable expectation in continued rent payments after NYF failed to renew the contract by May 2004, we conclude that the frustration of this lease agreement, caused by the State's justified efforts to provide relocation assistance to NYF, did not effect a compensable taking. *Id.* at 1581-82.

Affirmed.

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Economic Development Authority

By: Dale Laster Lessne
Deputy Attorney General
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SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION –
ESSEX COUNTY
DOCKET NO.
ESX-L-9424-05

| | |
|---|---|
| RAR DEVELOPMENT ASSOCIATES,<br>Plaintiff,<br>v.<br>NEW JERSEY SCHOOLS CONSTRUCTION CORPORATION AND NEW YORK FOLDING BOX COMPANY,<br>Defendants. | Civil Action<br>ORDER DISMISSING AMENDED COMPLAINT AS TO DEFENDANT NEW JERSEY ECONOMIC DEVLEOPMENT AUTHORITY<br>(Filed Jul. 21, 2006) |

THIS MATTER a having been opened to the court by Zulima V. Farber, Attorney General of New Jersey, attorney for defendants New Jersey Schools Construction Corporation and New Jersey Economic Development Authority, by Dale Laster Lessne, Deputy Attorney General, appearing, on Notice of Cross-Motion for Dismissal of the Amended Complaint as to Defendant New Jersey Economic Development Authority in Lieu of Answer, and Law Offices of W. Lane Miller, attorney for plaintiff RAR Development Associates, W. Lane Miller, Esquire, appearing, and the Court having considered the papers submitted in support and in opposition herein; and for good cause shown;

IT IS on this 21st day of July, 2006;

ORDERED that:

1. The Amended Complaint is hereby dismissed as to defendant New Jersey Economic Development Authority.

2. A copy of this Order shall be served on all parties within seven (7) days of the date of receipt by defendant.

/s/ Jared D. Honigfeld
JARED D. HONIGFELD,
J.S.C.

In accordance with the required statement to *R.* 1:6-2(a), this motion was ✓ opposed ___ unopposed.

LAW OFFICES OF W. LANE MILLER
1203 ROUTE 9 SOUTH
WOODBRIDGE, NEW JERSEY 07095
**ATTORNEYS FOR PLAINTIFF**
TELEPHONE: (732) 855-1588

| | |
|---|---|
| RAR DEVELOPMENT ASSOCIATES<br>PLAINTIFF<br>V.<br>NEW JERSEY SCHOOLS CONSTRUCTION ET. AL.<br>DEFENDANT | SUPERIOR COURT OF NEW JERSEY<br>ESSEX COUNTY<br>LAW DIVISION<br>CIVIL ACTION<br>Docket No.: ESXL-9424-05<br>**ORDER**<br>(Filed May 26, 2006) |

This matter having been opened to the Court upon Motion by the application of W. Lane Miller, attorney for plaintiff, with notice to Dale Laster-Lessne, Deputy Attorney General for defendants NJSCC and NJEDA, and Harry Noretsky, attorney for defendants New York Folding Box Company and the Court having considered the moving papers of plaintiff, and the papers in opposition thereto and the oral argument of counsel, if any, and it appearing that good cause therefore has been shown,

IT IS on this [26th /s/ ] day of May 2006

ORDERED that

1. [The Motion for /s/ ] Partial summary judgment ~~is hereby granted in favor~~ of plaintiff [is denied /s/ ] ~~and against defendant on Count Four~~

~~and Eight of the Complaint finding that the NJEDA and its subsidiary, NJSCC engaged in a taking of plaintiffs property for which plaintiff is entitled to just compensation~~; and

2. Plaintiff is hereby granted leave to amend the Complaint to specifically name the New Jersey Economic Development Authority and the caption to the Complaint.

FURTHER ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days from the date hereof.

/s/ Jared D. Honigfeld

SUPREME COURT
OF NEW JERSEY
App. Div. #A-0057-06T1

RAR DEVELOPMENT ASSOCIATES,

Plaintiff-Appellant

v.

NEW JERSEY SCHOOLS CONSTRUCTION CORPORATION and NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,

Defendants-Respondents,

And

NEW YORK FOLDING BOX COMPANY,

NOTICE OF PETITION FOR CERTIFICATION

(Filed Jul. 25, 2008)

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To: Clerk of the Supreme Court
Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Clerk of the Appellate Division
Hughes Justice Complex
PO Box 006
Trenton NJ 08625-0006

Anne Milgram
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State of New Jersey Office of the Attorney General
Department of Law and Public Safety
Division of Law – 25 Market Street – PO Box 114
Trenton NJ 08625-0114
Attn.: Dale Laster Lessne
Attorney for Defendants – Respondents
New Jersey Schools Construction Corp. and
The New Jersey Economic Development Authority

David Kaplan Esq.
Tobias & Kaplan
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Attorney for Defendant New York Folding Box

TAKE NOTICE that Plaintiff RAR Development Associates shall petition the Supreme Court for an Order certifying the entire judgment entered by the Appellate Division in the above matter on July 9, 2008. The filing fee of $200 is enclosed herewith.

Date: 7/25/08

Respectfully submitted,

By: /s/ W. Lane Miller
W. Lane Miller
Attorney for
Plaintiff-Petitioner

SUPREME COURT OF NEW JERSEY
C-307 September Term 2008
63,023

RAR DEVELOPMENT ASSOCIATES,

Plaintiff-Petitioner,

v.

NEW JERSEY SCHOOL CONSTRUCTION CORPORATION and NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,

Defendants-Respondents.

and

NEW YORK FOLDING BOX COMPANY,

Defendant.

ON PETITION FOR CERTIFICATION

(Filed Oct. 30, 2008)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-57-06 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 28th day of October, 2008.

/s/ Stephen Townsend
CLERK OF THE
SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-485 September Term 2008
63,023

RAR DEVELOPMENT ASSOCIATES,

Plaintiff-Movant,

v.

NEW JERSEY SCHOOL CONSTRUCTION CORPORATION and NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,

Defendants.

ORDER

(Filed Apr. 2, 2009)

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 31st day of March, 2009.

/s/ Stephen Townsend
CLERK OF THE
SUPREME COURT